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No.

72-314

In the

Supreme Court of the United States

OCTOBER TERM, 1972

ROBERT KEEFER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner, Robert Keefer, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit.

JUDGMENT AND OPINION OF THE COURTS BELOW

The judgment of conviction in the United States District Court for the Northern District of Illinois, Eastern Division, was entered on the 16th day of February, 1971, and is not reported, but appears in the record filed with and certified by the United States Court of Appeals for the Seventh Circuit and transmitted herewith.

The opinion of the United States Court of Appeals for the Seventh Circuit affirming said judgment was

entered on July 24, 1972 and is not yet reported. The same is set forth as Appendix A attached hereto.

JURISDICTION

The instant petition for certiorari is filed within thirty days of the rendition of the opinion by the Seventh Circuit Court of Appeals.

This Court's jurisdiction is conferred by Title 18, Section 1254(1).

QUESTIONS PRESENTED

1. Whether the introduction of purported narcotic transactions not alleged in the indictment and the preclusion of full cross examination by Petitioner about them denied the Petitioner the right to know the nature and cause of accusation against him, confrontation and due process of law?

2. Whether the denial of a one-day continuance to the Petitioner in order to secure the attendance of a subpoenaed defense witness who failed to appear denied Petitioner the right to have compulsory process for obtaining witnesses in his favor and due process of law?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides in pertinent part as follows:

> "No person shall be . . . deprived of life, liberty, of property, without due process of law; . . . ."

The Sixth Amendment in pertinent part provides as follows:

> "In all criminal prosecutions the accused shall enjoy the right to . . . be informed of the nature and cause

of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, ..."

STATEMENT OF THE CASE

On September 22, and 30, and on October 7, 10 and 13, 1969, John W. Carter sold heroin to federal narcotic agent Frank J. Boyles. Petitioner was charged with aiding and abetting Carter on those dates in those transactions. All the important evidence against the Petitioner at his trial came from the lips of Carter who testified for the Government. Over specific and continuing objection of the Government was allowed to elicit from Carter testimony of other purported narcotic transactions between Carter and the defendant in March and May of 1969, though not alleged in the indictment. The Court refused to allow Petitioner's counsel on cross-examination of Carter to inquire into the alleged March and May transactions in detail.

The Court further refused to grant a continuance of one day when a witness subpoenaed by Petitioner (a Chicago police officer) failed to appear.

REASONS FOR GRANTING THE WRIT

1.

THE DECISION OF THE COURT OF APPEALS IN THE OPINION BELOW AFFIRMS THE DENIAL TO PETITIONER OF HIS RIGHTS TO KNOW THE NATURE AND CAUSE OF THE ALLEGATIONS AGAINST HIM, TO CONFRONTATION, AND TO DUE PROCESS OF LAW.

All the important testimony against Petitioner was elicited from Government Witness John Carter, the actual seller of narcotics to Federal Agent Frank J. Boyles.

No marked money, no heroin, no confession or other evidence incriminated Petitioner. It was imperative, therefore, that Petitioner receive a fair trial including the right to full cross-examination.

Petitioner came to Court prepared to defend against allegations that he had aided and abetted Carter in selling narcotics to Agent Boyles in September and October, 1969. At no time prior to trial was Petitioner informed that the Government would offer evidence of alleged transactions in March and May, 1969. Yet, over specific objections by Petitioner, Carter was allowed to testify that he engaged in narcotic activity during those months with Petitioner. To allow such evidence clearly denied Petitioner his Sixth Amendment right "to be informed of the nature and cause of the accusation." See *Boyd* v. *United States,* 142 U.S. 450.

When it came time, however, for cross examination of Carter, Petitioner's counsel sought to elicit some of the details concerning the alleged transactions in March and May 1969 as testified to by Carter. However, the Court compounded its former error by refusing to allow cross examination concerning the alleged prior transactions, stating, "I don't know how that is relevant to any issue insofar as this case is concerned." (Abstract, Vol. I, p. 47). Neither did the Court, as promised, instruct the jury concerning the purpose for which the Court admitted, albeit erroneously, evidence of the prior alleged transactions. Such action by the Court completely frustrated the Petitioner's right of Confrontation which includes full cross examination. See *Pointer* v. *Texas,* 380 U.S. 400. The Court of Appeals below inadequately attempts to answer all these contentions in one sentence:

"Although the appellant argues, with some cogency, that the trial court should have permitted inquiry into these areas, we find that the court's rulings were within its discretion and do not warrant reversal of the conviction." (App., p. 3)

2.

THE COURT OF APPEALS DECISION BELOW ERRONEOUSLY AFFIRMED THE DISTRICT COURT'S DENIAL OF PETITIONER'S RIGHT TO HAVE COMPULSORY PROCESS FOR OBTAINING WITNESSES IN HIS FAVOR.

Government witness Carter testified that Petitioner aided and abetted him in selling narcotics to Agent Boyles. Petitioner's defense was that Carter acted alone and without the knowledge or assistance of Petitioner. As stated previously, there was no evidence against Petitioner save for the testimony of Carter. Petitioner, therefore, sought to show not only that Carter was a liar, but had continued to engage in narcotic transactions after his arrest in the instant cause. Pursuant thereto, Carter was asked on cross examination whether he in fact had sold and possessed narcotics on July 29, 1970, while the instant indictment was pending against him. Carter specifically denied selling and possessing narcotics at that time. On defense, Petitioner subpoenaed Chicago police officer Willis Nance who failed to appear. Petitioner then requested the Court to continue the cause one day in order to obtain the presence of Nance, offering to prove by the testimony of Nance that Carter had in fact sold narcotics and possessed narcotics on the said date, July 29, 1970. The Court denied the motion for a continuance.

The Court of Appeals below attempts to justify the District Court's refusal on the ground that Nance's testimony would result in evidence of "alleged misconduct which has not resulted in a conviction of an offense involving moral turpitude. . ." (App., p. 3). Subpoenaed police officer Nance was not desired for the purpose stated by the Court of Appeals, but rather to directly impeach Carter on a matter testified to by Carter before the jury. If the Sixth Amendment right to have compulsory process for obtaining witnesses means anything it should mean that a Chicago police officer must appear when subpoenaed and that the United States Courts will uphold that provision.

CONCLUSION

No amount of strained spurious reasoning by the Court of Appeals should obfuscate the fact that the Petitioner was denied basic constitutional guarantees and that such denials can not be characterized by implications as "discretionary", "unimportant", or "harmless".

Petitioner prays that this Honorable Court issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1971 — APRIL SESSION, 1972

No. 71-1176

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERT LEE KEEFER,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 70-CR-581

BERNARD M. DECKER, *Judge.*

JULY 24, 1972

Before SWYGERT, *Chief Circuit Judge,* PELL, *Circuit Judge,* and GORDON, *District Judge.**

GORDON, *District Judge.* After a jury trial, the appellant was convicted of violations of two federal narcotic laws, 26 U.S.C. §4705(a) and 21 U.S.C. §174. The appellant urges the reversal of his convictions for alleged trial errors concerning (1) limitations on his cross-examination of the government's principal witness; (2) the court's refusal to grant a one-day continuance of the trial to compel the attendance of a Chicago police officer who had

* District Judge Myron L. Gordon of the Eastern District of Wisconsin is sitting by designation.

failed to respond to a subpoena; and (3) the admission of a "history sheet" into evidence. In addition, the appellant contends that the proof is insufficient to establish his guilt beyond a reasonable doubt. We affirm the convictions.

The scope of cross-examination was discussed by this court in *United States* v. *Lawlinski*, 195 F.2d 1, 7 (7th Cir. 1952):

> "These relaxations of the general rule governing the proper scope of cross-examination, however, obviously cannot be defined with certainty to fit all occasions; their extent and limitations will depend upon the particular facts and circumstances of the case on trial. Generally, therefore, it is recognized that determination of where those limitations lie is within the sound discretion of the trial court. It is for the presiding judge to exercise a wise discretion in determining whether, considering the examination in chief, it is fit and proper that the questions presented be permitted or excluded. *Storm* v. *U.S.*, 94 U.S. 76, 24 L.Ed. 42. All the decisions agree that the latitude allowed should be great enough to subserve ends of justice; but once fixed by the trial court it can not be deemed erroneous except where it is clear that that discretion has been abused, even though the discretion is necessarily vague in extent."

See also *United States* v. *White*, 454 F.2d 435 (7th Cir. 1971); *United States* v. *Spatuzza*, 331 F.2d 214 (7th Cir. 1964).

John Carter, a co-defendant in the action at bar, previously pleaded guilty to and was awaiting sentencing for federal narcotic law violations which arose out of the instant transactions. Carter testified that he and the appellant had a "business relationship" since March, 1969 in connection with traffic in narcotics and that he (Carter) made approximately six trips to New York for the purpose of transporting narcotics. The last such trip, according to Carter, was made by him during May, 1969 — over four months before the transactions occurred which resulted in the indictment of the appellant.

During Carter's cross-examination, the court sustained the government's objection to questions concerning the names of the persons from whom Carter had purchased narcotics in New York on the ground that it was not relevant to any issues in the indictment. In addition, the court sustained the government's objection to questions concerning the reputation of one Grover MacMillan, who was arrested with the appellant on October 16, 1969.

Although the appellant argues, with some cogency, that the trial court should have permitted inquiry into these areas, we find that the court's rulings were within its discretion and do not warrant reversal of the convictions.

The appellant also assigns error to the refusal of the trial court to grant a one-day continuance during the trial to compel the attendance of one Willis Nance, a Chicago policeman, who had failed to respond to a subpoena. It is claimed by Mr. Keefer that the attendance of this police officer was necessary in order to impeach the credibility of Carter; the latter testified that he had not sold heroin subsequent to the time he agreed to become a government witness. The appellant then made an offer of proof that Officer Nance would testify that a reliable informant had stated that such informant had purchased heroin from Carter on July 29, 1970 and also that Officer Nance executed a search warrant at Carter's apartment on the same date, seizing a quantity of marijuana.

We hold that it was not error to have refused the requested adjournment. Character impeachment by proof of alleged misconduct which has not resulted in a conviction of an offense involving moral turpitude must be limited to the cross-examination of the witness whose credibility is under attack. *United States* v. *Lawler*, 413 F.2d 622 (7th Cir. 1969); *United States* v. *Battaglia*, 394 F.2d 304 (7th Cir. 1968), vacated and remanded on other grounds, 394 U.S. 310 (1969); *United States* v. *Bowe*, 360 F.2d 1, 14 (2d Cir. 1966); *United States* v. *Sweeney*, 262 F.2d 272 (3d Cir. 1959). In *Sweeney*, the court stated at page 277:

". . . when a witness is cross-examined for the purpose of discrediting his veracity by proof of specific acts of misconduct not the subject of a conviction, the examiner must take his answer as it is given and is not free to bring in independent proof to show that the answer was untrue. McCormic § 42 at n. 21; 3 Wigmore §§ 977, 979."

From the appellant's offer of proof, it is clear that almost all of the officer's proposed testimony would be inadmissible as hearsay. *United States* v. *Castro*, 438 F.2d 468 (7th Cir. 1971).

We reject the appellant's contentions that reversal of his convictions is required because of the admission into evidence of the appellant's "history sheet". This document was prepared by the arresting narcotic officers during an in-custody interrogation subsequent to the appellant's signing a "waiver of rights" form. The appellant does not claim that the waiver of rights form was not signed voluntarily but contends that the information was given as a pre-condition to bail. The history sheet revealed that the appellant identified himself as "Robert Lee Keefer"; that he was also known as "Robert Lee James", and that he had the nickname "Jabbo"; that he had three addresses; and that he drove a certain automobile.

The trial court denied the appellant's motion to suppress the history sheet after a hearing outside the presence of the jury. This court will accept the findings of a trial court unless they are clearly erroneous. *United States* v. *Ganter*, 436 F.2d 364, 368 (7th Cir. 1970). The trial court's order admitting the history sheets was not clearly erroneous, and, furthermore, even if it were, it would be harmless error for there is ample evidence in the record which independently establishes facts contained on the sheet.

The contention that the proof received at the trial failed to establish the appellant's guilt beyond a reasonable doubt is without merit. We must view the evidence in the light most favorable to the government and must sustain the findings of the jury if there is substantial evidence

to support its verdict. *Glassner* v. *United States*, 315 U.S. 60, 80 (1942). The jury apparently chose to disbelieve the appellant and instead believed the testimony of Carter, and, thus, the jury could properly find that the appellant supplied narcotics to Carter for sale and shared in the proceeds. *Nye & Nissen* v. *United States*, 336 U.S. 613, 619 (1949).

AFFIRMED.